NO. 2709 AND NO. 2713

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

ALASKA PACIFIC FISHERIES,
a Corporation
*Plaintiff In Error*

vs.

TERRITORY OF ALASKA,
*Defendant In Error*

HOONAH PACKING CO., a Corporation,
*Plaintiff In Error*

vs.

TERRITORY OF ALASKA,
*Defendant In Error*

UPON WRITS OF ERROR TO THE DISTRICT COURT FOR ALASKA, DIVISION NO. 1.

## Brief for the Defendant in Error

J. H. COBB,
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ALASKA DAILY EMPIRE PRINT

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## STATEMENT OF THE CASE

These two cases were tried together in the Court below, and as they involve identically the same question, we will treat the two together in this Brief.

By an Act approved April 29, 1915, (Session Laws of Alaska, 1915, page 185,) the business of operating a fish trap in Alaska was taxed by a License Tax in the sum of One Hundred ($100.00) dollars. By a proviso in Section 2 of the Act (Session Laws 1915, page 188.)

"Any person, firm or corporation now engaged in any of the lines of business specified in Section 1, shall comply with this Act, on or before July 1st, 1915, by applying for the License (and paying the tax, if a fixed sum) for the current year ending December 31st, 1915, and all taxes for the current year shall be calculated for the year beginning January 1st, and ending December 31st, 1915."

By Section 4, a right of civil action for the tax was given.

Under the provisions of this Act, the Territory of Alaska filed its complaint against the Alaska Pacific Fisheries, alleging that during the month of June, 1915, and continuously up to the time of the filing of the complaint, which was on July 10, 1915, the defendant was engaged in the business of operating 22 fish traps, all within the waters of Southeastern Alaska, and subject to the tax of One Hundred

($100.00) dollars each. And it was further alleged that the defendant had failed, neglected and refused to pay the said License Tax, or any part thereof, and judgment was prayed for Twenty-two Hundred ($2200.00) dollars.

In Case No. 2713 a similar complaint was filed on July 7, 1915, alleging that the defendant was operating eleven fishing traps in the waters of Southeastern Alaska, and had failed, neglected and refused to pay the License Tax.

To these complaints, demurrers were interposed which, so far as material to the points involved, attacked the Act of the Alaska Legislature under which the actions were brought, on the ground

*First*, That the Act was void and was beyond the power of the Legislature to enact under the Act of Congress creating the Alaska Legislature and the Constitution of the United States.

*Second*, That the Act was void, because the tax attempted to be laid by the Act referred to in the complaint was not uniform upon the same class of subjects, in that said Act taxes fish traps and gill nets, while seines are not taxed, thereby imposing a burden upon those fishing by means of traps and gill nets which is not imposed upon those fishing by means of seines.

*Third*, Act referred to is void, in that it is an attempt to lay and collect a tax without any reference to the value of the thing taxed, contrary to the provisions of the Organic Act.

*Four*, That the tax imposed by the Act of the Legislature is in fact a specific tax on property, and as such is levied without any reference to the value of the property sought to be taxed, and is therefore contrary to the provisions of the Organic Act in that regard.

The demurrers were overruled in an opinion rendered by the trial court on August 11, 1915.

Thereafter, the defendants answered in each case, and, in addition to raising the same points by the answer that had been raised by the demurrer, two other points were raised, namely,

*First*, Whether the Act laying the tax was not void, because, as alleged, the term of the Legislature had expired when the law was passed?

*Second*, As to whether or not the catching the fish to be canned and then sold is engaging in the fishing business, within the meaning of the law?

Both cases were tried upon agreed statements of fact. The Court adopted the facts agreed upon, as the facts in the case sustained the law passed by the Alaska Legislature upon all points, and rendered a judgment in favor of the Territory against each of the defendants for the amounts stipulated, in the event the Court was of the opinion that the law was valid.

The opinions of the trial court rendered upon the demurrer and on the rendition of the judgments, seem to us so clear and conclusive on all the points raised, that we shall content ourselves with adopting the reasoning and authorities therein cited.

The opinion on the demurrers, is found in the Record in 2709, at page 47, and in 2713 at page 6, and is as follows:—

By Act approved April 29, 1915, the Legislature of Alaska provided as follows:

"Section 1. That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska, shall apply for and obtain a license and pay for said license, for the respective lines of business as follows:

. . . . . .

8. Fish traps, fixed or floating, $100.00 per annum. So-called dummy traps included."

. . . . . .

It also provides in Section 2 that

"Every person, firm or corporation desiring to engage in any of the lines of business specified in Section 1, shall first apply to and obtain from the Territorial Treasurer a license. If the tax for the license applied for is a fixed sum, the amount of such license tax shall accompany the application."

Said Section 2 further provides for the bringing of a suit, either civil or criminal, to collect the license, and Section 4 of the said Act provided:

"Special remedies provided by this Act * * * shall not be deemed exclusive, and any appropriate remedy, either civil or criminal or both, may be revoked by the Territory in the collec-

tion of all taxes; and in civil actions the same penalties may be collected as are herein provided in criminal actions."

Under the provisions of this Act of the Legislature, the Territory of Alaska brought suit against the defendant, alleging in the complaint:

"That during the month of June, 1915, and continuously up to the present time the defendant was engaged in and prosecuting and attempting to prosecute the business of fishing by means of fish-traps situate in the waters of Alaska, and that it has failed, neglected and refused to pay the license tax, or any part thereof, provided for by said Act of the Legislature. Wherefore the Territory asks judgment for the amount of the license tax due."

To this a demurrer has been interposed, on the ground that the said complaint does not state facts sufficient to constitute a cause of action, and in support of the demurrer the point is raised that the Legislature had no power to impose such a tax, for the reasons—

1. Congress has reserved to itself the exclusive control of the fish and game of Alaska. (6)

2. The said tax is in violation of Section 9 of the Organic Act of the Territory (Act of June 26, 1906 aforesaid), which provides:

"All taxes shall be uniform upon the same class of subjects and shall be levied and collected under the general laws, and the assessment shall

be according to the actual value thereof."

As to the first point raised in support of the demurrer, to-wit: "Congress has reserved for itself the exclusive control of the fish and game of Alaska"; it is urged that by the Act approved June 26, 1906, 34 Stat. L. 478 Congress provided:

> "That every person, company or corporation carrying on the business of canning, curing or preserving fish, or manufacturing fish products within the Territory known as Alaska * * * shall, in lieu of all other license fees and taxes therefor and thereon, pay a license tax on their said business and output as follows:
>
> Canned Salmon, 4c per case;
>
> Pickled Salmon, 10c per barrel;
>
> Salt Salmon in bulk, 5c per 100 pounds;
>
> Fish Oil, 10c per barrel;
>
> Fertilizer, 20c per ton";

and that the Organic Act of the Territory, passed six years after the Act of 1906, and which provides:

> "that the power of the Legislature should not extend to the fish laws * * * or to the laws of the United States providing for taxes on business and trade; provided, further, that this provision shall not operate to prevent the Legislature for imposing other and additional taxes or licenses" (C. L. 1913, Sec. 421).

should be taken to mean that the Legislature is not prohibited from imposing other and additional licenses or taxes "on other kinds of industries and on

other kinds of business or trade not covered by the Act of 1906."

The reasoning advanced why the Court should so hold is not convincing—on the contrary, as the Organic Act is the latest expression of the legislative will on the subject, it would seem that it must be taken as repealing that part of the former act which is in conflict therewith, to-wit; "shall, in lieu of all other license fees and taxes." For the Court to hold that the later act does not repeal the former act to the extent indicated, it would be compelled to read into the later act some words which (7) are not there, to-wit: "On other kinds of industries and on other kinds of business or trade not covered by the act of 1906." This would not be justified by any canon of construction. The very position of the proviso in the statute shows what Congress had in mind, to-wit, that in imposing other and additional licenses or taxes the Legislature should not be fettered by anything contained in the act of 1906. It is not apparent that there is any need of construction, for the language is plain and unambiguous. A reference to the debates in Congress when the bill was before it would clear up any ambiguity if, indeed, any such existed.

The bill came up for argument on Wednesday, the 24th of April, 1912. In its original form the proviso was as follows:

> "That the authority herein granted to the Legislature to alter, amend, modify and repeal

laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States";

and nothing was there said about the game or the fish. Whereupon the following occurred:

Mr. WILLIS.—Mr. Chairman, I offer the following amendment, which I send to the desk and ask to have read.

The Clerk read as follows:

Line 9, page 23, after the word "States," insert the words "or to the game laws of the United States applicable to Alaska."

Mr. MANN.—Why not make it game and fish laws?

Mr. WICKERSHAM.—Mr. Chairman, I think the fish laws ought to be left alone.

Mr. MANN.—Why not make it game and fish laws, so that they cannot repeal the fish laws? They can pass new fish laws.

Mr. WILLIS.—Mr. Chairman, I will accept that amendment, and ask unanimous consent that it be so modified and reported as modified.

The CHAIRMAN.—Without objection, the amendment will be so modified, and the clerk will report the amendment as so modified.

The Clerk read as follows:

Line 9, page 23, after the word "States" insert the words "or to the game and fish laws of the United States applicable to Alaska."

Mr. WICKERSHAM.—Mr. Chairman, I do not

think that the word "fish ought to be in there. I think the fisheries in Alaska need protection. They belong to the people of the State or to the Territory, and they do not belong to the Government of the United States. They are not now being protected. They are not now being conserved, and if this Legislature will do something toward conserving and protecting the fish it ought to be allowed to do it. This simply bars the Legislature from protecting the fisheries in that Territory, and it ought not to be in the bill. (8)

Mr. MANN.—The gentleman will notice this provision does not apply to passing laws, but only to the repealing of laws.

Mr. WILLIS.—It seems to me the observation of the gentleman from Illinois answers the objection of the gentleman from Alaska. It simply provides, if it shall be adopted, that the Legislature of the Territory of Alaska shall not have the power to alter, amend or repeal the United States fish or game laws now in force in the Territory. It does not take away from the Legislature the power to pass additional laws of that character. It seems to me that meets the objection.

Mr. WICKERSHAM.—I think they ought to be allowed to amend them.

Mr. WILLIS.—We have a Federal fish law in Alaska. The gentleman is not objecting to that.

Mr. WICKERSHAM.—No.

Mr. WILLIS.—That is all this amendment pro-

vides—that the Legislature shall not have the power to amend the present fish or game laws.

Mr. WICKERSHAM.—What does that mean?

Mr. WILLIS.—It means that the present law shall stand.

Mr. FLOOD of Virginia. Suppose Congress passes a law revising and extending the fish laws there?

Mr. WILLIS.—Well, undoubtedly that will be paramount law of Alaska.

Mr. FLOOD of Virginia. What will be the effect of the gentleman's amendment?

Mr. WILLIS.—The effect of this amendment will be, as I understand it, simply to take away from the Legislature of Alaska the power to amend the fish or game laws now in effect in Alaska.

Mr. FLOOD of Virginia. It would not have the effect to take away from the Legislature of Alaska the power to amend the fish laws we hereafter pass.

Mr. WILLIS.—No; I do not think it would, as I have worded it, although I did not have that in mind when I drafted the amendment.

Mr. MANN.—They would not have that power.

Mr. WILLIS.—They would not have that power now.

Mr. FLOOD of Virginia. The gentleman is aware of the fact there is a proposition to revise the fish laws?

Mr. WILLIS.—Yes; I think the bill is a good one and ought to pass.

Mr. FLOOD of Virginia. And will in all probability become the law.

Mr. WILLIS.—It seems to me this meets the objection that has been raised in a perfectly fair manner, and I think it is a fair objection, but I do not believe the Legislature ought to repeal the present game or fish laws.

Mr. MANN.—We have endeavored to provide in a way for the conservation of the fisheries and game up there. We ought not to permit those laws to be repealed, but if they want to make them more stringent, and probably do, they ought to have that right.

Mr. FLOOD of Virginia. I do not think the amendment means anything, but if it will please anybody to put it in, why, let it go.

Mr. WICKERSHAM.— I shall withdraw my objection.

The question was taken, and the amendment was agreed to.

(Vol. 48, Part 6, page 5288, Congressional Record, 62nd Congress, Second Session.)

This, however, did not seem to be specific enough for the Senate, for when the bill reached that body it was amended by having added to this provision (9)

> "Provided further that this provision shall not operate to prevent the Legislature from imposing other and addition taxes and licenses."

The House refused to agree to this and to several other amendments, and the committee on Conference of the House reported, recommending that the House recede from its disagreement to this Senate amendment. The House did recede from said disagreement, and the Senate proviso was added to the bill.

This occurred on August 20, 1912, and the record of it is found in said Congressional Record at page ——.

Thus it will be seen—

1. That there is on the face of the bill no expression of any such purpose as is contended for.

2. That no such purpose as is contended for was in the minds of the legislators when the bill passed, but on the contrary what was in their minds was that the Legislature should have the power to levy additional taxes on the fish and the game business and on other businesses.

As to the second point raised in support of the demurrer, to-wit: "The said tax is in violation of section 9 of the Organic Act of the Territory";

A reference to the legislation and to one Supreme Court decision on the subject of the taxation of the fisheries business in Alaska may throw some light on the subject.

By the criminal code of Alaska, adopted March 3, 1899 (C. L. 1913, Sec. 2569), Congress provided:

> "That any person or persons, corporation or company prosecuting or attempting to prose-

cute any of the following lines of business, within the District of Alaska shall first apply for and obtain a license so to do from a District Court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to-wit: * * *

Fisheries: Salmon Canneries, 4c per case;
Salmon Salteries, 10c per barrel;
Fish Oil Works, 10c per barrel;
Fertilizer Works, 20c per ton."

The point was raised that this act was in violation of Section 8, Article 1 of the Constitution of the United States, (10) which reads:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, * * * * but all duties, imposts and excises shall be uniform throughout the United States";

and that said act, insomuch as it directed the money to be paid into the Treasury of the United States could not be sustained. The point was passed upon in the case of Binns v. United States (194 U. S. 486, decided May 31, 1904), and Justice Brewer, at page 491 says:

"We shall assume that the purpose of the license fees required by Section 460 is the collection of revenue, and that the license fees are excises within the constitutional sense of the terms. Nevertheless we are of the opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the

administration of local government in Alaska.

It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same as in all the Territories. We are accustomed to that generally adopted for the Territories, of *a quasi* State Government, with executive, legislative and judicial officers, and a Legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a Legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three Commissioners, who are the controlling officers of the district. It may entrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created

no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes."

And later on in the decision the learned Justice quotes the following from Volume 32 Congressional Record, part 3, page 2235, to-wit:

"'The committee on Territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the (11) Territory of Alaska.

* * * They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the Territory of Alaska including the Governor and several other officers, this code or list of licenses was prepared by the committee. It was

prepared largely upon their suggestions and upon the information of the committee derived from conversing with them.'

While, of course, it would have simplified the matter and removed all doubt if the statute had provided that those taxes be paid directly to some local treasurer and by him disbursed in payment of Territorial expenses, yet it seems to us it would be sacrificing substance to form to hold that the method pursued when the intent of Congress is obvious, is sufficient to invalidate the taxes.

In order to avoid any misapprehension we may add that this opinion must not be extended to any case, if one should arise, in which it is apparent that Congress is, by some special system of license taxes, seeking to obtain from a Territory of the United States revenue for the benefit of the nation as distinguished from that necessary for the support of the Territorial government."

Thus it will be seen that the license was declared to be a tax and was sustained as not being in contravention of the said article of the Constitution, on account of the fact that the money, although to be paid into the Treasury of the United States, was to be used for the support of the Territory—in other words, that it was a tax imposed on businesses in Alaska by Congress, the then legislative body for Alaska, for local purposes.

Then came the Acts of Congress of March 30, 1906, and of March 24, 1912, *supra.*

Such being the state of Federal legislation on the subject of taxing the fishing industry in Alaska, the Legislature of Alaska passed the act whose validity is here assailed.

We have seen by the Binns case that Congress when imposing a license tax system on businesses in Alaska, was not fettered by the constitutional prohibition as to uniformity. It must be conceded that Congress had plenary power over the Territory—That is, that it could legislate on all rightful subjects of legislation not prohibited by the national constitution. This power it (12) had, not so much from its constitutional power to make rules and regulations for the government of the Territory, as from its inherent power arising from the ownership of the *res.* Having this power, Congress certainly had the power to confer it upon the legislature. It is true that the powers of that legislature are limited by the act defining those powers and that in this respect a Territorial Legislature differs from State Legislatures; that is to say, the Organic Act of a Territory if a grant of specific powers and not a reservation of specific powers.

Congress, when implanting this new jurisdiction in Alaska, expressly provided that the power of the Alaska Legislature

"shall extend to all rightful subjects of legis-

> lation not inconsistent with the laws of the United States, but it shall not, etc."

then follow exceptions too numerous to mention,—more than have obtained in the case of any other Territory,—well nigh emasculating the original grant, and causing it to "speak the word of promise to the ear and break it to the hope." However, of its pristine vigor there is left enough to justify the imposition of license taxes and property taxes. Such power finds its warrant in the principle that unless a power is forbidden to our Legislature the latter possesses the power—"provided it be a rightful subject of legislation." That is to say, Congress, ordaining for this Territory on Organic Act, does a thing for the Territory which in its nature but not in its extent, is similar, analogous, to what the people of a State do when they adopt a constitution for the State.

> "The legislative power to be exercised by the Territorial Legislature is the legislative power of the Territory, not that of the United States. Both States and Territories, in a certain sense, derive their existence from the legislation of Congress, but the jurisdiction and authority exercised, either by a State or a Territory, is that of a State or Territory, and not that of Congress. Territorial statutes have a distinct and well-defined character of their own. The people of a Territory, when authorized to form a Territorial government, are vested with a

qualified sovereignty. Congress may limit their powers, and may annul their enactments, but, subject to these limitations, the Territory is a government. Its laws, (13) unless set aside by Congress or the Courts, are the laws of the Territory; they are not laws of the United States, within the ordinary meaning of those terms; certainly not in the sense that the Acts of Congress, approved by the President, are laws of the United States." (16 Fed. 715.)

This being true, the inquiries are these:

(a) When the Legislature imposed this license tax, was it exercising power over a rightful subject of legislation? If it was not so exercising power, the enactment must fall; if, however, it was so exercising power, the eanctment must stand, unless it violates some other provision of the constitution, (Organic Act.)

25 Cyc. p. 599, Sec. 3, and cases cited in Note 16.

(b) Pursuing the argument, then: Such power, being a rightful subject of legislation, exists in the Legislature of this Territory unless there is some provision in the Organic Act which negatives the power. If there is any such provision, where is it to be found?

Counsel for defendant affects to find it in that provision of the Organic Act which declares that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and assessments shall be according to the value

thereof. No taxes shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein any one year."

If this uniformity requirement applied to anything except direct property taxes the argument might prevail—but that in fact it does apply exclusively to direct property taxes and to nothing else has been decided so often as to be beyond cavil.

25 Cyc. p. 605-6, and cases cited.

"The constitutions of many of the states contain the requirement that taxation shall be equal and uniform, that all property (14) in the state shall be taxed in proportion to its value, that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, or that the Legislature shall provide for an equal and uniform rate of assessment and taxation; and in the face of such provisions a tax law which violates the prescribed rule of equality and uniformity is invalid, although there is sufficient difference in the wording of the different provisions to account for some lack of uniformity in the decisions as to what constitutes a violation of their requirements. The requirement does not apply to every species of taxation, and does not restrict the Legislature to the levying of taxes upon property alone. The restriction relates only to the rate or amount of taxation and its incidence upon taxable persons and property, and

does not limit the Legislature in regulating the mode of levying and collecting the taxes imposed, and it also relates only to property within the state, and neither the statutes of another state nor the action of taxing officers can affect the question. In the absence of such a constitutional requirement it is not essential to the validity of taxation that it shall be equal and uniform, and in such a case a tax law cannot be declared unconstitutional merely because it operates unequally, unjustly, or oppressively.

The requirement of equality and uniformity applies only to taxes in the proper sense of the word, levied with the object of raising revenue for general purposes, and not to such as are of an extraordinary and exceptional kind, or to local assessments for improvements levied upon property specially benefitted thereby, or to other burdens, charges, or impositions which are not properly speaking taxes; and further, such a constitutional provision is to be restricted to taxes on property, as distinguished from such as are levied on occupations, business, or franchises, and on inheritances and successions, and as distinguished also from exactions imposed in the exercise of the police power rather than that of taxation.

The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the Legislature from

taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation, or that if those following the same calling are divided into classes for the purpose of taxation, the basis of classification shall be reasonable and founded on a real distinction, and not merely arbitrary or capricious. To this extent, also, and no further, the principle applies to license fees or taxes imposed under the police power or for the better regulation of occupations supposed to have an important public aspect."

(37 Cyc., 729-33.)

"It is argued that the legislature has only such powers of taxation as is conferred by Section 9 of the Organic Act. But this is a mistake. It is true that that section expresses the limit of its powers as to direct property taxation, but it is elsewhere granted the express power to raise revenue by license taxes (C. L. 1913, S. 410), and as a matter of fact that is the only method of taxation which the Legislature has adopted.

It is said that the system of taxation adopted is the exercise of special and not general legislation. This position is untenable. See Codlin v. Kohlhausen, 58 P. R. 499.

It is said that there has been no assessment, but

"The cardinal rule in taxation that whenever

a tax is to be fixed by assessment the due assessment must precede any valid claim of such tax does not apply to license taxes, except where the statute expressly so provides, or where the tax is according to value, or depends upon the ascertainment of persons or value by some designated official."

(25 Cyc., p. 628.)

It is said that the fact that a lien on the property is reserved for the taxes shows that this is a property tax, but

"In order to accomplish the certain collection of license taxes, the statute may declare that such taxes shall be a lien on the property assessed and entitled to be paid in preference to all mortgages and incumbrances."

(25 Cyc., p. 628.)

It is said there is no such business or line of business as fish-traps and that that fact, together with the fact that dummy traps are included is proof positive that this is a property tax pure and simple —a tax on the *res* and not on the business. A dummy trap is a sham trap not used for fishing, but designed simply to squat on and hold a trap location. None of the traps in question are dummy traps. The complaint seeks to recover the license tax from "fishing" traps, and if the tax on them is valid, it would not matter that the tax on dummy traps is invalid.

It is true there is no such business or line of business as fish-traps, but this is a mere "inapti-

tude of expression,"—The meaning is plain when the language is read in connection with that knowledge of the fishing business (one of the main enterprises of Alaska) common to all our people and of which the Legislature will not be considered ignorant and of which the Court will take judicial notice. The Legislature meant that whoever conducts the business of fishing by means of fish-traps must pay the license required by law. Although taxation statutes are to (16) be strictly construed against the taxing power, yet they are to be construed to mean something, if possible, and are not to have their vitality frittered away by technical refinement."

The opinion in the final hearing is found in the record in 2709, at page 67, and 2713 at page 42, and is as follows:—

"In its opinion rendered on the occasion of overruling the demurrer to the complaint in this cause, the Court decided in favor of plaintiff all the questions now presented (at the trial *all* herof) except

1. The question as to whether or not the term of the Legislature had expired when Chapter 76, Laws of the Alaska Legislature of 1915 was passed:

2. The question as to whether or not the catching of fish to be canned and then sold is "engaging in the fishing business;

and those two questions will now be considered.

(1) The Organic Act (Sec. 413, Compiled Laws of Alaska 1913) provides: (35).

"That the Legislature of Alaska shall convene at the capitol at the City of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but the said Legislature shall not continue in session longer than sixty days in any two years unless again convened in extrordinary session by a proclamation of the Governor."

By the stipulation of facts it appears that the Legislature convened on the 1st day of March, 1915, at 12 o'clock noon. By the Organic Act it is not to continue in session longer than 60 days in any two years. By the stipulation it also appears that the act in question "was finally passed by both houses of the Legislature and approved by the Governor and was enrolled and filed in the Office of the Secretary of State for the Territory as it now appears in the printed volume of the Session Laws for 1915—Chapter 76."

Conceding for the sake of argument only, that that clause of the stipulation does not settle the matter and preclude any further inquiry, this question arises: At what time did the 60 days mentioned in the Organic Act expire?

There seems to be a conflict of authorities as to whether or not Sundays and holidays are to be inincluded in counting the sixty days. The cases of

Cheyney vs. Smith, 23 P. R. 680 (Ariz.), of Moog vs. Randolph, 77 Ala. 608, and some others, hold to the negative: In the dissenting opinion in the Arizona case some authorities holding to the affirmative are collected; and in an opinion dated March 16, 1889, given by Attorney General Miller to the Secretary of the Interior that official distinctly held that Sundays and holidays are to be counted as days of sessions; (Vol. 19. p. 259, Opinions of Attorneys General); but, however this may be, the Alaska Legislature of 1915, convened at noon on the 1st day of March, 1915, and adjourned *sine die* "between 3 and 4 o'clock A. M. (sun time), on April 30, 1915, (see stipulation); so that even counting Sundays and holidays, it did not continue in session longer than 60 days; for the full period of sixty days did not expire until noon of the 60th day— (36) that is noon of April 30, 1915.

*White v. Hinton*, 17 L. R. A. 66 (Wyo.)

As to the second question: Defendant contends that the catching of fish is a mere adjunct of the canning business, without which the latter cannot or does not exist; that it is not engaged in the business of fishing but in the business of canning, and that by Act of Congress approved June 26, 1906, (34 Stats. at Large 478), it was provided that the tax therein prescribed for carrying on the business of canning shall be "in lieu of all other license fees and taxes therefor and thereon." The argument, if carried out logically, would result in the proposition

that Congress itself having said that the tax provided in the act shall be in lieu of all other license fees and taxes, could not by a later law impose for the future a license larger in amount than that which was imposed by the former act, or taxing the different branches or instrumentalities of the canning business. Such a proposition is untenable, for the power of Congress is plenary in the matter. What Congress could do in this matter the Territorial Legislature can do, for the power of the latter extends to "all rightful subjects of legislation" not forbidden by the Organic Act (Organic Act, Sec. 416), and "except as herein provided, all laws now in force in Alaska shall continue in full force and effect until altered, amended or repealed by Congress or by the Legislature" (Organic Act, C. L., 410); and "Provided further: That this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses." As Congress, then, could provide that all persons catching fish for canning shall pay a certain license tax, and all persons canning the caught fish shall pay an additional license tax, so the Legislature, also, may provide the same thing. Now, that is just what the Legislature has done by the act in question: It has provided that all persons in the business or line of business of catching fish by means of (37) fish-traps, (whether or not they catch the fish for canning purposes) shall pay $100, and all persons canning the caught fish (whether the fish are caught in traps or nets

or seines) shall pay 4 cents per case, etc.—in other words, a license tax for catching and a license tax for canning.

Findings and judgment for plaintiff as per stipulation.

Nothing, it seems, can be added to the foregoing, except perhaps to say that Congress did exempt one species of business and property in Alaska from the operation of all Territorial Tax Laws, namely railroads, by providing in Section 9 of the Organic Act, "that the Congress reserves the exclusive power for five years from the date of the approval of this act to fix and impose any tax or taxes upon railways or railway property in Alaska." If it had intended to exempt this fisheries also, it certainly could have so provided in equally unambiguous terms.

In conclusion we respectfully submit that the judgments are right and should be affirmed.

J. H. COBB,

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